ated within the State at the time the loan was made. The presence of the certificates was necessary to make it of value, but they were not the right itself. And so the principal case is clearly sound, for there no rights were created within the state in favor of the non-resident bailor. He still had the legal and equitable title to the stock. The bare certificates were not attachable, for they could not have been sold on execution because the sheriff could not get or give title to the corresponding stock. This basic distinction between a bailment and a pledge of stock has not, however, always been clearly recognized in the cases.[11]

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JUSTIFIABLE RELIANCE ON SELLER AS BASIS FOR IMPLIED WARRANTY OF QUALITY. — The law of implied warranty in sales is comparatively modern. In the old cases, if the buyer did not himself require an express warranty of quality, the law implied none.[1] Now, however, it is well settled that in some cases aside from any express stipulations of the parties a seller is held to warrant at least the merchantability of his goods.[2] The basis of this obligation is the justifiable reliance of the buyer upon the seller's superior knowledge and greater judgment in the sale.[3] What will justify the buyer's reliance is essentially a question of fact.[4] In determining this question, all the circumstances of the sale should be considered. But the courts tend to formulate fixed rules to govern given states of fact.[5] Thus some American courts distinguish sharply between sales by a manufacturer, and sales by a dealer,[6] crystallizing into a rule the probability that a manufacturer knows more about his products than a dealer.

The result of the tendency to lay down fixed rules, rather than to view all the facts broadly to determine when a warranty arises by implication, is well illustrated by the cases involving implied warranties of fitness for a particular purpose. That a product is fit for the general purpose of its manufacture is but another way of saying that it is merchantable.[7] But under certain circumstances a warranty will be implied not only that articles are merchantable but that they are fit for a particular purpose.[8] In a recent New York case, the plaintiff, a manufac-

[11] Winslow *v.* Fletcher, 53 Conn. 390. Based on the interpretation of a local statute, the decision of this case is probably right, but the language of the court is too broad and fails to make the distinction pointed out in this note.

[1] Barr *v.* Gibson, 3 M. & W. 390; Parkinson *v.* Lee, 2 East 314; Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331.

[2] Jones *v.* Just, L. R. 3 Q. B. 197.

[3] See Kellogg Bridge Co. *v.* Hamilton, 110 U. S. 108, 116; Omaha Coal, Coke & Lime Co. *v.* Fay, 37 Neb. 68, 75.

[4] See Preist *v.* Last, [1903] 2 K. B. 148, 154; WILLISTON ON SALES, §§ 231, 236.

[5] Stanford *v.* National Drill & Mfg. Co., 114 Pac. 734 (Okl.); Obenchain & Boyer *v.* Incorporated Town of Roff, 116 Pac. 782 (Okl.). The cases cited are two recent cases which give a decision after a general statement of the law without any discussion of the particular facts involved.

[6] See 16 HARV. L. REV. 590. A number of authorities for and against this distinction are collected in WILLISTON ON SALES, §§ 232, 233.

[7] Professor Williston illustrates this principle by saying that the general purpose of a reaping machine is to reap. But if the machine could not reap, it would not be even merchantable. See WILLISTON ON SALES, § 235.

[8] Kellogg Bridge Co. *v.* Hamilton, *supra*; Bierman *v.* City Mills Co., 151 N. Y. 482.

turer, sold the defendant some cloth, which the plaintiff knew was to be used in making clothes. Upon examination the cloth proved to be unfit for that purpose, and in a suit for the balance of the price it was held, that there was an implied warranty of the cloth's availability for the intended purpose. *Rhodesia Mfg. Co.* v. *Tombacher*, 129 N. Y. Supp. 420 (Sup. Ct., App. Term). It is usually stated that where a manufacturer contracts to supply an article which he manufactures to be applied to a particular purpose so that the buyer necessarily trusts to his judgment, the law implies an undertaking on his part that the article is reasonably suited to the known purpose; but where a known, described, and definite article is ordered, although it is stated to be required for a particular purpose, if the specified article be supplied, there is no warranty that it shall answer the particular purpose intended.[9] Under this statement, extreme cases can be decided very easily, but there is a middle ground which it does not cover. In the law of express warranty, in order that a buyer may hold his seller, it is not necessary that he shall have relied exclusively on the warranty in making the purchase.[10] Likewise, in the law of implied warranty, the buyer need not have relied solely on the judgment of the seller to claim the advantage of an implied warranty.[11] It is in the decision of a close case, where the buyer in part selects his own article, yet at the same time relies upon the seller's greater knowledge, that the rule, as ordinarily stated, falls short of being an accurate test. That a just result is oftentimes reached, nevertheless, by the American courts is evidenced by the decision of the principal case. But it is submitted that, to weigh a close question in the law of implied warranty accurately, the facts themselves must be balanced, and all rules or presumptions of fact must be laid aside.[12]

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NATURE OF RIGHT OF LANDOWNER IN UNDERLYING OIL AND GAS. — The limited nature of property rights in fluid substances occupying underground areas is well illustrated by cases dealing with petroleum and natural gas. The problem is to give each landowner the fullest possible enjoyment of what lies within his territory, and yet to make him regard the rights of others in the common reservoir. It was early decided that oil and gas are minerals forming part of the realty,[1] and are assignable as such,[2] but when severed they become personalty and may be sued for in trover and replevin.[3] The true extent of the landowner's rights in them was, however, long sought through imperfect analogies. "Their fugitive and wandering existence" caused them to

[9] The above statement is substantially a quotation from the opinion of Fuller, C. J., in Seitz *v.* Brewer's Refrigerating Machine Co., 141 U. S. 510, 518, 519.

[10] See Chicago Tel. Supply Co. *v.* Marne & Elkhorn Tel. Co., 134 Ia. 252, 258.

[11] *Cf.* West Michigan Furniture Co. *v.* Diamond Glue Co., 127 Mich. 651; Preist *v.* Last, *supra*.

[12] For a general discussion of the subject of this note and a collection of authorities, see WILLISTON ON SALES, §§ 228–236.

[1] Williamson *v.* Jones, 43 W. Va. 562.

[2] Murray *v.* Allred, 100 Tenn. 100.

[3] See Kelley *v.* Ohio Oil Co., 57 Oh. St. 317, 328; Hail *v.* Reed, 15 B. Mon. (Ky.) 479.